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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GARY CINOTTO, et al., Plaintiffs and Appellants, v. JOSHUA H. LEVINE, et al., Defendants and Respondents.	2d Civil No. B242191 (Super. Ct. No. 1304357) (Santa Barbara County)

Appellants were shareholders of Mentor Corporation (Mentor), a Minnesota corporation headquartered in Santa Barbara. Mentor develops, manufactures, licenses and sells products serving the aesthetic medical market such as breast implants, body contouring products and dermal fillers. Respondents are the former members of Mentor's Board of Directors (Board). In November 2008, respondents approved the sale of Mentor to Johnson & Johnson at a price of $31 per share, or $1.1 billion.

Appellants allege respondents breached their fiduciary duties because they approved the sale to Johnson & Johnson without reasonably considering adequate information concerning the value of Mentor, causing them to sell the company for an artificially low price per share. The trial court granted respondents' motion for summary judgment, concluding there were no disputed issues of material fact and that respondents reasonably approved the sale. Appellants contend this "reasonable approval" ruling was error. They further contend the trial court erred when it decided they were not entitled to a jury trial, refused to compel the deposition of Johnson & Johnson's most knowledgeable person, and struck their designation of a supplemental expert witness. We affirm.

Facts

Appellants allege the respondent directors breached their fiduciary duties when they approved Johnson & Johnson's acquisition of Mentor because they failed to obtain the highest price per share for the benefit of Mentor's shareholders, employed an inadequate decision making process, consciously disregarded information concerning the true value of Mentor, and made an unreasonable decision to sell the company at $31 per share. Evaluating these contentions requires us to review the respondent directors' decision-making process in some detail.

Mentor develops, manufactures, license and sells products related to reconstructive and cosmetic medical procedures such as breast implants, products used in liposuction, and dermal fillers used in facial "rejuvenation" procedures. In 2008, Mentor was also developing a botulinum toxin product, known as "PurTox," which it hoped would compete with BoTox. Testing on the product had not yet been completed and the product had not been approved for sale by the Food and Drug Administration (FDA).

Respondents are the seven members of Mentor's former board of directors. Six of the directors were independent, "outside" directors with professional backgrounds in health care, finance, consulting, accounting, tax, government and law. The seventh, Joshua Levine, was Mentor's President and CEO.

In early August 2008, Mentor provided Johnson & Johnson, at its request, with Mentor's internal five-year financial forecast and strategic plan. On August 18, 2008, Levine and Joseph Whitters, the chairman of Mentor's Board, met with Johnson & Johnson's CEO and another high-ranking executive. Johnson & Johnson indicated it was interested in acquiring Mentor for $1.2 to $1.5 billion in an all-cash transaction that would not be subject to any financing conditions, subject to a due diligence investigation. The proposed offer price represented a premium of 30 percent to 60 percent over the then 30-day trading average for Mentor shares.

Levine and Whitters informed the directors of Johnson & Johnson's offer at the August 18 meeting of Mentor's board of directors. During the meeting, the directors retained legal counsel and retained CitiGroup Global Markets, Inc. (Citi) to act as its financial advisor.

At the Board's next meeting, on August 26 and 27, 2008, advisors from Citi made a presentation concerning the directors' fiduciary duties to Mentor shareholders in light of Johnson & Johnson's offer to acquire the company. Citi also reviewed the current and historic price of Mentor stock, noting that Mentor's share price had "declined recently due to softness in the U.S. economy and concern regarding [Mentor's] long-term growth." Citi noted that Mentor's "stock price has underperformed the Specialty Pharma sector and its peers in aesthetics since 2007 and the last twelve month period." The stock was then trading at around $25 per share, but Citi's preliminary discounted cash flow analysis estimated its equity value to be between $31 and $46 per share. Citi's "sum of the parts" analysis yielded an estimated value between $47 and $53 per share. Mentor's toxin and fillers business was estimated to contribute $7 to $9 per share to that price.

Citi's presentation emphasized that, in evaluating a change of control transaction, the Board had a fiduciary duty to maximize value for shareholders. If the Board elected to pursue a change of control transaction, it would have to decide whether to negotiate only with Johnson & Johnson, or to seek other potential buyers in a market test or auction process. Citi advised that it might be challenging to find other potential buyers for the entire business because, unlike most companies, Mentor's business included both surgical (e.g., implants) and dermatology (e.g., toxins and fillers) products.

The Board discussed whether it would be feasible to spin off Mentor's toxin and fillers businesses. It appointed an ad hoc committee of three directors to work with management and Citi to assess the value of these businesses and Mentor's other intellectual property assets.

Mentor's senior management determined that it would be more cost effective to develop longer term revenue projections for the toxin and fillers business in house, using Mentor personnel and Citi advisors, rather than retaining another group of consultants for that purpose. The ad hoc committee, chaired by Board member Katherine Napier, agreed with that determination. Napier believed the committee took its task seriously. The committee met, had telephone conferences with, and exchanged e-mails with Mentor management. Napier testified that the committee "did a fair amount of analysis on the toxins. But there were still a lot of unanswered questions on the toxins relative to . . . timing and . . . competitive entries and efficacy and whether there would be competitive advantage . . . ."

At the next meeting of Mentor's Board of Directors, on September 15 and 16, 2008, management informed the Board that Mentor's sales volume had dropped unexpectedly in August due to an unexpected reduction in the number of surgical breast implant procedures being performed. Management also informed the Board that Mentor's reported revenue would be 7 percent below its own forecast for fiscal year 2009. Ms. Napier reported on the ad hoc committee's work in valuing Mentor's intellectual property assets. In addition, Citi provided its financial analysis of the toxin and fillers business. This analysis incorporated preliminary 10-year revenue projections developed by Mentor management and estimated that the toxin and fillers business would add $8 per share to the company's value, leading to a theoretical share price of $33, rather than the current share price of $25. Citi acknowledged that Mentor's toxin product, PurTox, would enter the "fastest growing area of aesthetic medicine," but would also "likely be third to market with two strong competitors[.]" One of those competitors, BoTox, "has very strong brand identity, which could make market share gains difficult in consumer-driven applications[.]" Citi concluded the toxin business should be valued at $7.23 to $10.12 per share.

Citi also discussed the alternatives of selling Mentor's toxin and fillers business separately, or "spinning off" the business into a separate company. Citi noted that separating the toxin and fillers businesses from Mentor's surgical implant business "could theoretically yield a slight premium" over the Johnson & Johnson offer, and would allow Mentor's shareholders to participate in the "upside potential" created by Mentor's $31 million investment in developing that business. On the other hand, the "equity market performance" of comparable businesses had "weakened in the past year," leading to a stalled backlog of initial public offerings and dampening demand for new investment opportunities in that sector of the market. Separating toxins and fillers from Mentor's surgical implant business would be operationally and financially complex. A spin-off would also have to be adequately capitalized with at least two to three years' of cash. Citi further noted the potential "that the market will view a separation as 'giving up' on the business; unravel[ing] the logic of significant investment in the business." Finally, Citi created a long list of companies that might be interested in acquiring Mentor's toxin and fillers business. None of these companies had previously expressed such an interest.

The decline in sales that began in August continued through September and October. Mentor's sales volume and revenues declined relative to both its own strategic plan and to other firms in the same sector of the market. Mentor's share price also declined from a high of $28 per share to $17. At the same time, global financial markets experienced significant volatility and the United States plunged into a recession.

Mentor's Board held telephonic meetings on October 5, October 9 and October 17. On each occasion, management informed the Board members of changes in Johnson & Johnson's valuation of the company and negotiating posture. At the October 17 meeting, the Board was informed that Johnson & Johnson had approved a transaction value of $1.2 billion, or $33.26 per share. This price represented a 100 percent premium above the closing price of Mentor shares on October 16, which was $16.24 per share.

Mentor's Board met again, face to face, on October 20 and 21, 2008. In its presentation to the Board, Citi noted that since the September 15 Board meeting, "the global financial markets have experienced historic turmoil." Credit markets were frozen and the Dow had declined 19 percent "amid unprecedented volatility[.]" Consumer confidence fell significantly below expectations, 159,000 jobs in the U.S. had been lost in September alone, mortgage delinquencies had increased dramatically, and retail sales declined by .6 percent, "three times worse than expectations."

Meanwhile, Mentor's share price had declined 32 percent since September 15, "relative to a decline in the S&P 500 of 21% and a peer group decline of 19%."

Mentor was also preparing to announce its second quarter results and its adjusted plan for fiscal year 2009. Current fiscal year revenues and earnings per share were significantly below estimates and would be revised downward for the coming fiscal year. Citi informed the Board that fewer investment analysts were encouraging their clients to buy Mentor stock and that further declines in the share price were to be expected after Mentor issued its revised earnings and revenue forecasts. Even using management's most optimistic forecast, Mentor would need two to three years of steady growth for its stock price to rebound above Johnson & Johnson's then-current offer of $33.35 per share.

Mentor also had outstanding convertible bonds with an approaching maturity date of January 1, 2014, and a conversion price of $28.81 per share. If Mentor's stock price, which was then about $16 per share, did not rebound substantially above the conversion price, the bonds would have to be converted to stock and purchased by the company. Citi advised the Board to consider how Mentor would fund this buy back. Mentor's chief financial officer testified that Mentor had existing credit facilities and cash on hand to honor the convertible bonds. Doing so would have tightened Mentor's cash flow, but the company would have been able to continue doing business.

Citi's September 15 presentation incorporated 10-year revenue projections prepared by Mentor's management. These projections estimated that revenue from the toxin business would steadily increase but that the business would not become profitable until 2014. In its presentation for the October 20 Board meeting, however, Citi relied on five-year revenue projections also prepared by Mentor management. Because these projections ended in 2013, before the toxin business was expected to be profitable, they included the costs incurred to develop the toxin but not its potential revenues.

Board members could not recall whether anyone asked questions about the switch from 10-year to 5-year projections. However, several Board members testified they noticed the change and considered it to be reasonable. For example, Board chair Whitters testified that, because Mentor's toxin product, PurTox, was in a developmental stage and was not yet commercially viable, he considered the longer term projections of its profitability to be "highly speculative." Napier pointed out that the 10-year projections were developed before the financial crisis occurred. She was comfortable using the five-year projections because the Board was operating in "a very dynamic environment." Board members uniformly stated in their declarations that Mentor typically used five-year projections in developing its annual strategic plans and, in 2008, failed to meet its most recent one-year revenue and sales projections. In addition, PurTox was still in development and had not yet received FDA approval.

After Citi concluded its presentation, the independent directors met in executive session to discuss Mentor's options and the directors' duties to shareholders. They unanimously agreed that Mentor would proceed to negotiate a sale to Johnson & Johnson, rather than search for other potential buyers. In reaching this conclusion, the directors considered, among other things, "the limited number of potential strategic buyers who might be interested in buying Mentor, had the financial ability to buy Mentor, the Board's past unsuccessful efforts to sell Mentor, the diversion of management's time and financial resources to such a search, and the Board's concern that it was unlikely any interested and financially capable buyer could be located without significant delay. The Board also considered that, due to the economic climate, any delay in moving forward with the proposed [Johnson & Johnson] acquisition could lead [Johnson & Johnson] to decrease its valuation of Mentor or could result in [Johnson & Johnson] abandoning its interest in Mentor altogether." Directors also considered Mentor's financial condition, decreasing revenues and sales volume, and falling stock prices.

When the full Board reconvened, it unanimously agreed that management and Citi should proceed with negotiations with Johnson & Johnson, rather than actively solicit other potential buyers. The directors authorized Whitters, Levine, the financial advisors from Citi and the company's counsel to convey their interest to Johnson & Johnson, to seek a higher purchase price for Mentor's shares and to conclude the acquisition on the best possible terms. In particular, Mentor's directors wanted to preserve the company's ability to respond to a competing offer should one be made.

Johnson & Johnson was not willing to raise its purchase price above $1.2 billion. The Board met by telephone on October 30. It reviewed Johnson & Johnson's proposed terms and advised management to continue the negotiations. In addition, the directors received a report from management indicating that Mentor's sales had again declined in October and were below management's estimates. The Board also formed a special committee, comprised of its independent directors, to evaluate, negotiate and approve the proposed acquisition by Johnson & Johnson. (See, Minn. Stat. Ann. § 302A.673(d)(1).)

On November 3, 2008, Johnson & Johnson informed Mentor's CEO that it was not willing to proceed with the acquisition of Mentor because a recent study, published in a medical journal, raised new concerns about breast implants. Levine informed the Board of this development during a November 4 telephone meeting. The Board instructed management to continue Mentor's day-to-day operations and to remain responsive to further communications from Johnson & Johnson.

On November 5, 2008, Mentor released its results of operations for the fiscal quarter ending September 30, 2008, and lowered its guidance for the 2009 fiscal year significantly below analysts' expectations. Mentor's stock price again declined.

By mid-November, Johnson & Johnson informed Mentor that it had resolved its concerns and was willing to resume its due diligence and negotiations over the acquisition. It had, however, revised its valuation of Mentor to $1.1 billion, or $30.32 per share. Mentor countered at $1.15 billion and proposed other favorable terms. On November 20, Johnson & Johnson offered a price of $1.117 billion, or $30.82 per share. That same day, Mentor's stock price closed at $13.52 per share.

The Mentor Board met again, by telephone, on November 21, 2008. The directors advised Levine to propose a purchase price of $31 per share, representing a 110% premium over the current price of company shares. Levine communicated the Board's counter offer of $31 per share to Johnson & Johnson. Johnson & Johnson accepted the offer.

Mentor's Board of Directors met with management, the financial advisors from Citi and its legal advisors, by telephone, on November 29, 2008, to review a draft acquisition agreement that had been prepared by Johnson & Johnson. At the meeting, Citi informed the Board of its opinion that the acquisition at $31 per share was fair to Mentor shareholders. Citi presented the directors with financial data underlying its fairness opinion, including an overview of Mentor's share prices during the past two years. In addition, Citi presented a discounted cash flow analysis based on Mentor's forecasted operating results for the next five years.

The independent directors then met separately to discuss the transaction and unanimously recommended that the full Board approve it. When Levine rejoined the meeting, the full board of directors did so as well. In reaching that decision, directors considered a number of factors including: current economic conditions; Mentor's current and projected financial outlook; its projected revenues, operating income and expenses and cash flow; the risks associated with continuing as an independent business; the price offered by Johnson & Johnson and Mentor's current share price; other proposed terms in the draft acquisition agreement; the likelihood that Mentor would receive a competing bid from another corporation; and the rights of dissenting shareholders under Minnesota law.

Ms. Napier, for example, described her thought process this way: "I think we looked at the aggregate total of the deal and the environment in which we were and concluded it was quite a good deal for the shareholders. [¶] And in hindsight, it was an even better deal. I mean [Johnson & Johnson] -- I think the biggest premium they had ever paid for a company was 40 percent, 38 percent; and they were paying 110 percent . . . ." Napier noted that Mentor's share price had been falling even relative to its competitors, that Wall Street analysts had lost faith in the company and that the convertible bonds were coming due, which would damage the company's cash position. In her opinion, "it was a great thing that the leading health-care company in the world [wanted] to buy us and pay, you know, a premium for us in an economic environment that was pretty catastrophic." Napier believed the premium was sufficient to compensate Mentor for the potential future value of its toxin and fillers business. Other board members reached similar conclusions. They unanimously agreed the deal was fair to shareholders.

Mentor and Johnson & Johnson executed the acquisition agreement and issued a joint press release announcing the transaction on December 1, 2008. Mentor filed the required Schedule 14D-9 Solicitation and Recommendation Statement with the Securities and Exchange Commission on December 12. Ninety-four percent of the available shares were voluntarily tendered by the time the tender offer closed on January 22, 2009. No competing bidder made an offer for Mentor's shares during the 52 days that passed between the time Mentor publicly announced the sale to Johnson & Johnson and the close of the tender offer.

In early September 2008, Levine asked Vikram Bhardwaj, Citi's principal analyst, to provide him with information regarding Johnson & Johnson's treatment of executives from companies it acquired. Bhardwaj obliged by compiling publically available information about Johnson & Johnson's past acquisitions. Later in September, Levine asked Michael O'Neill, Mentor's chief financial officer and a former Johnson & Johnson employee, "if Johnson & Johnson executives have employment contracts." O'Neill replied that, to his knowledge, Johnson & Johnson was an employment at will company, so executives did not have employment contracts. On October 9, Levine asked O'Neill what he knew about how Johnson & Johnson compensated managers from acquired companies: "do they take a hands off view or transition people to their system?" O'Neill replied that, in his experience, Johnson & Johnson would not "instinctively" reduce executive compensation to its internal, generally lower levels. It would instead, "transition" executive compensation over time. By October 30, after Mentor's Board had already resolved to pursue the acquisition, Levine was waiting for Johnson & Johnson to provide him with the details of his compensation package. He was ready to sign an employment agreement with Johnson & Johnson by November 3 and to talk with other key personnel about staying on after the acquisition.

Levine shared with Whitters, the board chair, the information he received from Citi about Johnson & Johnson's executive retention practices. Levine also informed the Board that Johnson & Johnson wanted to retain the entire senior management team after the acquisition. The Board discussed this matter at its meetings on October 30, November 18, November 21 and November 29, 2008. Board members testified they were aware Levine was negotiating his own employment agreement with Johnson & Johnson. For example, Napier testified Levine was "very transparent" about his employment negotiations with Johnson & Johnson. She believed these negotiations could not be avoided "from a practical standpoint," because Johnson & Johnson would want to announce that Mentor's CEO supported the acquisition. Similarly, Whitters testified that the Board did not object to Levine negotiating his continued employment with Johnson & Johnson because it occurred late in the acquisition negotiations and because the Board wanted an orderly transition. Ultimately, Johnson and Johnson offered to retain all of Mentor's employees.

Procedural History

Four shareholder lawsuits were filed within days after Mentor and Johnson & Johnson announced the tender offer. These lawsuits were consolidated as the present matter. Initially, the case was assigned to a trial court judge who was a Johnson & Johnson bondholder. This judge recused himself and the matter was reassigned to the Hon. Thomas P. Anderle. Judge Anderle disclosed to the parties that he owned Johnson & Johnson stock but had instructed his broker to sell all of his shares. Judge Anderle was not disqualified.

Johnson & Johnson's tender offer for Mentor shares was scheduled to close in January 2009. The shareholders' motion for a preliminary injunction to prevent the acquisition from closing was denied by the trial court. In March, after the transaction closed, both Mentor and Johnson & Johnson were dismissed as no longer necessary parties to the litigation.

As discovery proceeded and the initial trial date loomed, the shareholders filed a motion for jury trial. The trial court, Judge Thomas P. Anderle, denied the motion, concluding the case would be tried to the court sitting without a jury, because the shareholders' claims for breach of fiduciary duty were equitable rather than legal in nature.

The trial court denied appellant's motion to compel the deposition of Johnson & Johnson's person most knowledgeable concerning the acquisition of Mentor. Thereafter, the trial court granted respondents' motion to strike the shareholders' designation of two supplemental expert witnesses. They initially designated J. Lester Alexander III as an expert witness on valuation matters and the calculation of the shareholders' damages. His testimony was expected to include opinions on the appropriate valuation methodologies and the appropriate methodologies for calculating damages in this matter. Respondents designated Alan W. Kleidon as their expert on damages. Mr. Kleidon based his opinions concerning shareholders' potential damages on a statistical analysis. The shareholders then designated Robert Reilly as a supplemental expert who was expected to provide "a response to the testimony of defendants' expert Allan W. Kleidon." Respondents' motion to strike the supplemental expert witness designation was granted. The trial court concluded Reilly should have been included in the shareholders' initial designation of expert witnesses because he, like Alexander, intended to testify regarding valuation and calculation of damages.

In October 2010, the trial court granted Mentor's motion for summary judgment. In December, he denied the shareholders' motion for reconsideration. Judgment was entered in favor of Mentor on January 4, 2011. In March 2011, the shareholders filed their notice of appeal. Four months later, they discovered that the trial court still owned 100 shares of Johnson & Johnson stock. Judge Anderle explained in a declaration that he held his Johnson & Johnson shares in three separate accounts; his broker had promptly sold the shares from two of those accounts but inadvertently failed to sell the shares held in the remaining account. In response to an alternative writ issued by this court, Judge Anderle vacated his order granting summary judgment and disqualified himself from further participation in this matter.

The case was assigned to Judge Donna Geck. After reconsidering and agreeing with two of Judge Anderle's prior discovery orders, Judge Geck also reconsidered Mentor's motion for summary judgment. In April 2012, without additional briefing or argument, the trial court once again granted Mentor's motion.

Contentions

Appellants raise five contentions on appeal. First, they contend they are entitled to a jury trial on their causes of action for breach of fiduciary duty and the trial court erred when it determined the case would be tried to the court, sitting without a jury. Second, they contend the trial court erred when it denied their motion to compel the deposition of Johnson & Johnson's person most knowledgeable regarding the acquisition of Mentor. Third, they contend the trial court erred when it struck their designation of a supplemental expert witness. The trial court also erred, the shareholders contend, when it failed to conduct a new hearing or "independently" analyze Mentor's motion for summary judgment. Finally, appellants contend the trial court erred in granting that motion because material issues of fact remain in dispute.

Standard of Review

We review for abuse of discretion the trial court's order denying the motion to compel the deposition of Johnson & Johnson's most knowledgeable person. (*First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1573.) The same standard of review applies to the order striking the shareholders' supplemental expert witness designation. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1110-1111.)

A motion for summary judgment gives the trial court "a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; see also *Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1325.) The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) To demonstrate the existence of a triable issue of material fact, the party opposing the motion must present evidence that "would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.)

"On appeal we conduct a de novo review, applying the same standard as the trial court. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064 . . . .) Our obligation is ' " 'to determine whether issues of fact exist, not to decide the merits of the issues themselves.' " ' (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1228 . . . .) We 'must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party.' (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843.)" (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 230.)

Jury Trial

Our de novo review of the record on appeal persuades us the trial court correctly granted Mentor's motion for summary judgment. Because no trial is required in this matter, it is not necessary for us to determine whether appellants would have been entitled to a jury trial.

Discovery Rulings

Appellants contend the trial court abused its discretion when it refused to compel the deposition of Johnson & Johnson's person most knowledgeable and when it struck their designation of a supplemental expert witness. Neither order was arbitrary, capricious, or outside the bounds of reason. (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1450.)

The trial court rationally concluded the deposition of Johnson & Johnson's most knowledgeable person was not likely to lead to the discovery of admissible evidence. Johnson & Johnson's internal valuation of Mentor is not relevant to the reasonableness of the valuation settled on by respondents. No one from Johnson & Johnson can testify concerning the information reviewed by respondents or the reasonableness of their decision-making process. Similarly, Johnson & Johnson cannot testify concerning the disclosure Levine made to respondents concerning the negotiations for his continued employment.

Nor did the trial court abuse its discretion when it struck the shareholders' designation of a supplemental expert witness. It was not arbitrary or irrational for the trial court to conclude that appellants had already designated an expert witness to testify on the same subject, albeit using a different methodology. (Code Civ. Proc., § 2034.280, subd. (a); *Basham v. Babcock* (1996) 44 Cal.App.4th 1717, 1723.)

Claimed Failure to Hold New Hearing

The shareholders contend Judge Geck erred when she granted respondents' motion for summary judgment because she did not "independently" review the motion and uncritically adopted Judge Anderle's prior decision. There was no error. First, the trial court's order granting summary judgment expressly states that the court "independently reviewed the record and the prior ruling[.]" We accept the truth of that statement. Second, in ruling on a motion for summary judgment, "a court has broad discretion to determine that a party waived the right to oral argument by failing to timely and properly invoke the procedure." (*Brannon v. Superior Court* (2004) 114 Cal.App.4th 1203, 1211.) Here, the trial court held oral argument prior to its initial ruling on the motion. Appellants did not expressly request oral argument when the trial court took up the motion for a second time. In the absence of an express request for argument and in light of the extensive record in support of, and opposition to the motion, we cannot say the trial court's decision to forego oral argument was arbitrary, capricious or outside the bounds of reason. (*Estate of Gilkison, supra,* 65 Cal.App.4th at pp. 1448-1450.)

Summary Judgment

Respondent is a Minnesota corporation. The parties agree that Minnesota law governs appellants' substantive claims. (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 645 [73 L.Ed.2d 269]; *Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 358-359.) Minnesota courts routinely follow Delaware law when deciding issues relating to corporate governance and the duties owed by corporate directors to shareholders. (*In re Xcel Energy, Inc.* (D.Minn. 2004) 222 F.R.D. 603, 606.)

Corporate directors "have a fiduciary duty to act in the best interests of the corporation's shareholders." (*Unocal Corp. v. Mesa Petroleum Co.* (Del. 1985) 493 A.2d 946, 955 (*Unocal*); see also *Westgor v. Grimm* (Minn. 1982) 318 N.W.2d 56, 58-59.) In evaluating a proposed merger or other change of control transaction, the Board "has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders." (*Unocal, supra,* 493 A.2d at p. 954.) Unless the directors determine that defensive measures designed to avoid a change in control are in the corporation's best interests, "obtaining the highest price for the benefit of the stockholders should [be] the central theme guiding director action." (*Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.* (Del. 1986) 506 A.2d 173, 182 (*Revlon*).)

Ordinarily, the propriety of a Board of directors' actions is measured by the business judgment rule. As the Delaware Supreme Court explained in *Unocal*: "The business judgment rule is a 'presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.' *Aronson v. Lewis,* Del.Supr., 473 A.2d 805, 812 (1984) (citations omitted). A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the Board if the latter's decision can be 'attributed to any rational business purpose.' *Sinclair Oil Corp. v. Levien*, Del.Supr., 280 A.2d 717, 720 (1971)." (*Unocal, supra,* 493 A.2d at p. 954; see also *In re UnitedHealth Group Inc Shareholder Derivative Litigation* (Minn. 2008) 754 N.W.2d 544, 551.)

There are, however, "rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable." (*Paramount Communications Inc. v. QVC Network, Inc.* (Del. 1994) 637 A.2d 34, 42 (*Paramount*).) A sale of corporate control is one circumstance in which enhanced scrutiny will be applied. (*Id.*) Pursuant to *Revlon,* corporate directors have a fiduciary duty to get the best price for the stockholders at a sale of the company. (*Revlon, supra*, 506 A.2d at p. 182.) This duty "applies only when a company embarks on a transaction -- on its own initiative or in response to an unsolicited offer -- that will result in a change of control." (*Lyondell Chemical Co. v. Ryan* (Del. 2008) 970 A.2d 235, 242.) When faced with a possible change of control, "the directors must focus on one primary objective -- to secure the transaction offering the best value reasonably available for the stockholders -- and they must exercise their fiduciary duties to further that end." (*Paramount, supra*, 637 A.2d at p. 44.)

The enhanced judicial scrutiny required by a sale of corporate control involves, "(a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably." (*Id.* at p. 45.) Although the court is not required to defer entirely to the directors' business judgment, we may not "ignore the complexity of the directors' task in a sale of control . . . . [A] court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness." (*Id.*)

Directors breach their duty to act honestly and in good faith when they intentionally disregard their responsibility to make informed decisions. A breach of the directors' duty of care is established where the evidence demonstrates "that the defendant directors knew they were making material decisions without adequate information and without adequate deliberation, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss." (*In re The Walt Disney Company Derivative Litigation* (Del. Ch. 2003) 825 A.2d 275, 289; see also *Lyondell*

Chem. Co. v. Ryan, supra, 970 A.2d at p. 243 [fiduciary breaches duty of good faith by failing to act in the fact of a known duty to act].)

Appellants contend the trial court erred when it granted respondents' motion for summary judgment because material issues of fact exist concerning whether the Board members breached their fiduciary duty to maximize the price per share paid by Johnson & Johnson for Mentor's stock. They contend the Board members accepted Johnson & Johnson's offer of $31 per share without full and accurate information concerning the value of Mentor's stock because they considered only the 5-year revenue projections rather than 10-year projections. The shorter-term projections undervalued Mentor because they included the high costs incurred to develop PurTox, but did not include any of the profit Mentor would realize when PurTox entered the market. Appellants further contend that material issues of fact remain in dispute concerning the impact Levine's employment negotiations with Johnson & Johnson had on the Board's consideration of Johnson & Johnson's offer to acquire Mentor.

We are obligated pursuant to *Paramount, supra,* and *Revlon, supra,* to determine whether the decision making process employed by the directors, including the information on which they relied, was adequate and whether their approval of the Johnson & Johnson acquisition was reasonable "in light of the circumstances then existing." (*Paramount, supra,* 637 A.2d at p. 45.) Our de novo review of the record persuades us that no material facts remain in dispute on these two issues.

It is undisputed that the general circumstances confronting Mentor's Board while it negotiated with Johnson & Johnson were daunting. The negotiations coincided with a global financial crisis and a deep recession in the United States' domestic economy. Unemployment and home foreclosures soared while consumer confidence and retail sales dropped to historic lows. At the same time, sales of Mentor's breast implants and other aesthetic medical products dropped precipitously. Sales volume and revenues declined relative to Mentor's own short-term forecasts, relative to the estimates of investment analysts, and relative to other firms in the same sector of the market. Meanwhile, Mentor's share price, which had been hovering around $27, dropped to $19 in early October 2008 and continued to slide for the next eight weeks before closing at $13.52 per share on November 20, 2008. Investors also held bonds convertible to stock on January 1, 2009, at a price of $28.81 per share. Even though, as appellants insist, Mentor's Board members and management "continued to believe in the [the company's] future prospects," no one could, at the time, predict with any confidence when the recession would end, or when Mentor's sales volume, revenues and stock price would rebound to pre-recession levels.

Operating in the context of a volatile economy, dramatically reduced sales volume and declining share prices, the Board accepted a valuation for Mentor that was based on 5-year, rather than 10-year projections. The Board members' declarations each state: "I understood that in Citi's subsequent valuation work, including its fairness opinion issued in connection with the acquisition by [Johnson & Johnson], Citi used 5-year projections that were prepared by management rather than the 10-year projections. This made sense to me in light of, among other things, the fact that management normally utilized 5-year projections in connection with its annual strategic plans, Mentor had failed to meet even its recent one-year projections, the risks associated with the future toxin development program and uncertain FDA approval, and there was uncertainty regarding Mentor's timing to market relative to competitors." Board members made similar statements in their depositions, emphasizing that they approved the use of shorter term projections because the longer-term projections seemed speculative under the circumstances.

Appellants attempted to create disputed issues of fact by insisting that: the Board members knew 10-year projections were "critical" to valuing the company as a whole; the Board members knew the 10-year projections were "reliable, achievable, and common to valuing companies like Mentor[;]" Board members did not question the reliability or achievability of the 10-year projections; and that Board members knew the five-year projections did not reflect profits to be earned from PurTox. These statements do not create material factual disputes because they either are not supported by the evidence or are not material.

For example, the statement that Board members "knew" 10-year projections were "critical" to valuing the company as a whole refers to an August 21, 2008 e-mail exchange between Whitters and Bhardwaj. Whitters stated he wanted to understand "the true value of the parts" of Mentor, and Bhardwaj agreed "the ultimate answer to that question will be very important." But the switch to five-year projections occurred later, in October 2008, after the Board had considered preliminary 10-year projections and learned that, in the midst of a financial crisis and recession, the company was not meeting even its one-year projections for sales volume and revenue. In light of these circumstances, the Board's review of 10-year projections in August and September 2008 does not raise a triable issue on the question of whether it was reasonable for the Board to rely on five-year projections in October and November.

The statement that Board members, management and Citi all "knew" the 10-year projections were "reliable" and "achievable," does not raise a triable issue of material fact for the same reason. Appellants' supporting evidence for this statement is that Board members never expressly stated they believed the 10-year projections were unreliable or unachievable, and that Citi never "took the position that the inputs or assumptions underlying the ten-year projections were not viable." However, the fact that Board members did not expressly challenge the use of 10-year projections in Citi's September presentation does not mean they acted unreasonably when they relied on 5-year projections two months later. Similarly, while Citi never informed the Board that the 10-year projections were "not viable," it also advised the Board that uncertainties associated with products under development, such as PurTox, "make[] it challenging to develop long-term projections[,]" for those products.

Appellants vehemently insist the Board of directors made the wrong decision when it relied on the five-year projections rather than the 10-year projections. Our task, however, is to determine whether the Board acted on adequate information and made a reasonable decision, not whether it made the right one. Appellants failed to raise a disputed issue of material fact on that point. Facing a nearly unprecedented economic downturn, the company's own deteriorating financial condition and declining share price, and the impending call date for its convertible bonds, the Board accepted an offer to sell Mentor's shares at a 110 percent premium. Prior to doing so, they consulted with financial advisors and considered strategic alternatives such as spinning off the toxin and fillers business for a separate sale and remaining an independent company. Given this undisputed evidence, no reasonable juror could find that the Board members consciously disregarded their fiduciary duty to "secure the transaction offering the best value reasonably available for the stockholders[,]" or that their decision to accept the Johnson & Johnson offer was not, "on balance, within a range of reasonableness." (*Paramount, supra,* 637 A.2d at pp. 44, 45.)

Appellants contend the trial court also erred in granting summary judgment because Levine was self- interested in the transaction. To prevail on the claim that respondents breached their fiduciary duty of loyalty, appellants must establish that (1) a majority of the board of directors were self-interested; (2) a self-interested director controlled and dominated the Board; or (3) a self-interested director failed to disclose his interest to the other directors and reasonable Board members would have viewed that self-interest as material to their evaluation of the proposed transaction. (*McMillan v. Intercargo Corp.* (Del.Ch. 2000) 768 A.2d 492, 504 fn. 54.)

Appellants did not demonstrate the existence of a disputed issue of material fact on this claim. Six of the seven members of Mentor's Board of directors were independent and had no self-interest in the transaction. It is also undisputed that Levine, the only director who had a personal financial stake in the transaction, disclosed to his fellow Board members that he was negotiating with Johnson & Johnson concerning his continued employment after the acquisition. There is no evidence Levine "controlled and dominated" the Board. It is undisputed that the outside directors met to consider the proposed acquisition outside his presence. Additionally, as we have already discussed, the outside directors were aware of and agreed with Citi's decision, made after the September 2008 Board meeting, to base its analysis and fairness opinion on five-year projections rather than 10-year projections. In light of these undisputed facts, we conclude appellants failed to raise a disputed issue of fact on the question of whether Levine controlled and dominated the other Board members.

Conclusion

The judgment is affirmed. Costs to respondents.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Donna D. Geck, Judge

Superior Court County of Santa Barbara

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